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No. 90-317

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

PHYLLIS PRUITT, Individually and KATIE C. PRUITT, a Minor by PHYLLIS PRUITT, her Mother and "Next Friend,"

Petitioners,

vs.

PPG INDUSTRIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Respondent accepts the statement of the Question Presented contained in the Petition for Writ of Certiorari.

LIST OF PARTIES

Petitioner--Phyllis Pruitt, Individually and KATIE C. PRUITT, a Minor, by PHYLLIS PRUITT, her Mother and "Next Friend"

Respondent--PPG Industries, Inc.

RESPONDENT'S RULE 29.1, STATEMENT

There is no "Parent Company" to PPG Industries, Inc. The following are non-wholly owned subsidiaries and affiliates:

PPG Industries (France) S.A.

--Societe Industrielle, Commerciale et Financiere de Peintures

--PPG Scandinavia A/S

Non-Wholly Owned Subsidiaries and Affiliates (Continued)

--PPG Sweden AB

J. M. Eltzroth & Associates, Inc.

PPG Iberica, S.A.

PPG Industries Taiwan Ltd.

Taiwan Chlorine Industries Ltd.

Industrie Vernici Italiane S.p.A.

Ampaspace S.r.l.

Export Sales Companies

--PPG Glasexco S.A.

--PPG Crystal A.G. (PPG Crystal S.A.)

--PPG Glass (UK) Ltd.

--Glasunit A/S

--Glaskontoret A/S

Pennvasia Limited

--Guangdong Float Glass Co. Ltd.

Separations Technology, Inc.

Arkansas Chemicals, Inc.

Asahi-Penn Chemical Company, Ltd.

Non-Wholly Owned Subsidiaries and Affiliates (Continued)

Dongju Industrial Co., Ltd.

Pittsburgh Corning Corporation

--Nippon Pittsburgh Corning, K.K.

--Pittsburgh Corning International Sales Company Limited

AZDEL, Inc.

Pittsburgh Corning Europe N.V.

--Deutsche Pittsburgh Corning GmbH

--Pittsburgh Corning France S.A.R.L.

--Pittsburgh Corning Nederland B.V.

--Pittsburgh Corning (United Kingdom) Limited

--Pittsburgh Corning Gesellschaft mbH

--Pittsburgh Corning (Schweiz) AG

--Pittsburgh Corning Scandinavia AB

PFG Fiber Glass Corporation

PPG-Nanchang Chemical Technology Development Corporation, Ltd.

Non-Wholly Owned Subsidiaries and Affiliates (Continued)

Inveca-Pittsburgh C.A.

--Vidrio C.A.

--Disvica, C.A.

Silenka B.V.

--Silenka Deutschland G.M.B.H.

--Silenka France

--Silenka U.K. Ltd.

Tatung Coatings Co.

Quantum Technologies, Inc.

Belletech Corp.

P.T. Asahimas Subentra Chemical Co., Ltd.

VFG-Sudamtex, C.A.

PPG-Siam Silica Company, Limited

Ace Insurance Company, Ltd.

Exel, Ltd.

Glass Plaza Associates

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OPINIONS AND JUDGMENT BELOW

Respondent accepts the citation to the opinions and judgment of the lower courts as stated in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondent accepts the Statement of Jurisdiction contained in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent accepts the verbatim recessitation of Constitutional Provisions and Statutes Involved in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Decedent Homer T. Pruitt was employed by Lockheed Corporation at its plant in Marietta, Georgia. He was working in the fuselage area of an aircraft on May 15, 1987, when he collapsed and later died. Based on an autopsy, the medical examiner of Marietta, Georgia determined that Pruitt's death was caused by inhalation of 1-1-1 trichloroethane "fumes-residue."

Respondent produced 1-1-1 trichloroethane under the registered trade name of Tri-Ethane 366. Tri-Ethane 366 was shipped to decedent's employer in 55-gallon drums, on which Respondent attached warning labels. The labels stated in large bold letters "**WARNING! VAPOR HARMFUL.**" and, further, in small letters:

> DO NOT BREATHE VAPORS. High vapor concentrations can cause dizziness, unconsciousness, or death. USE ONLY WITH ADEQUATE

VENTILATION. . . .DO NOT SWALLOW. Swallowing may cause injury or death.

Additional warnings regarding Tri-Ethane 366 were provided to Lockheed in the form of Material Safety Data Sheets. Under the section captioned "Effects of Overexposure," Respondent warned that "inhalation can cause irritation of the respiratory system, dizziness, nausea, lightheadedness, headache, loss of coordination and equilibrium, unconsciousness, possible central nervous system damage and even death in confined or poorly ventilated areas. . . ."

Respondent moved for summary judgment asserting the adequacy of its warnings as a matter of law.

On June 14, 1989, the United States District Court for the Northern District of Georgia granted summary judgment in Respondent's favor.

On March 1, 1990, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision and held that Respondent's ". . .warning was sufficient as a matter of law. . . ." Pruitt v. PPG Industries, Inc., 895 F.2d 734, 736 (1990). A petition for rehearing before the Eleventh Circuit was denied on May 1, 1990.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eleventh Circuit fully considered the facts of this case, applied the appropriate controlling authority, and properly affirmed summary judgment in Respondent's favor.

The "Question Presented" does not fall within any of the three categories of certiorari considerations contained in Rule 10.1(a)-(c) of the Rules of the Supreme Court of the United States nor does it raise any "special or important reasons," as required by Rule 10, for this Court to grant certiorari.

Petitioner's attempt to obtain review by this Court fails when considered against all historically recognized indica favoring the exercise of this Court's discretionary powers of review.

REASONS FOR DENYING THE WRIT

(1) DECISION BELOW FOLLOWS AN UNBROKEN LINE OF AUTHORITY FLOWING FROM CONTROLLING DECISIONS.

The Eleventh Circuit's decision below was based upon an unbroken line of authority emanating from this Court's decisions in Celotex Corporation v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), which are controlling. This line of authority includes 57 published opinions in which the Eleventh Circuit considered and applied the Celotex decision and 33 such opinions in which the Eleventh Circuit considered and applied Anderson.

(2) THE COURT BELOW FULLY CONSIDERED THE RECORD BEFORE IT, PROPERLY RECOGNIZED THE APPROPRIATE SUBSTANTIVE LAW, AND CORRECTLY APPLIED CONTROLLING AUTHORITY.

Petitioner seeks this Court's discretionary review to determine whether the Eleventh Circuit ". . .improperly applied the federal summary judgment standard expounded in Celotex Corporation v. Catrett." (Question Presented, Petition for Writ of Certiorari, page i).

In this diversity action, the substantive law of the State of Georgia applies. Under Georgia law, in cases such as this where it is alleged that inadequate warnings of a product's hazards have been given, an essential element of Plaintiff's prima facia case, on which he will have the burden of proof at trial, is the inadequacy of the warnings given. See, Copeland v. Ashland Oil Co., 188 Ga.

App. 537, 373 S.E. 2d 629 cert. denied 188 Ga. App. 911, 373 S.E.2d 629 (1988).

Respondent filed a properly supported Motion for Summary Judgment asserting the adequacy of its warnings as a matter of law.

In Celotex, supra, this Court construed the plain language of Fed.R.Civ.P. 56(c) as mandating the entry of summary judgment, upon a properly supported motion, "against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

When ruling on Motions for Summary Judgment, this Court has instructed trial courts to bear in mind the "actual quantum and quality of proof necessary to support liability" in a given case. Anderson, 477 U.S. at 254. The standard for summary

judgment mirrors that for directed verdict, so that if on any part of the prima facia case there would be insufficient evidence to require submission of the case to a jury, summary judgment must be granted. Id., 477 U.S. at 250.

The Eleventh Circuit properly reviewed the evidence of record de novo. (See, Buxton v. City of Plant City, Fla., 871 F.2d 1037 (11th Cir. 1989). Keeping in mind the actual quantum and quality of proof necessary to support the "inadequacy of warning" element of Petitioner's prima facia case, the Eleventh Circuit affirmed summary judgment upon its expressed finding that Petitioner ". . .failed to adduce **ANY EVIDENCE** showing they could prove [inadequacy of warnings] at trial." Pruitt, 895 F.2d at 736 (emphasis added).

This finding, that Petitioner failed to adduce any evidence as to the

inadequacy of Respondent's warnings, fully refutes Petitioner's argument that the Eleventh Circuit "improperly weigh[ed] the evidence." (Question Presented, Petition for Writ of Certiorari, page i). Obviously, without any evidence of the inadequacy of the warnings given, there was nothing against which the Eleventh Circuit could have weighed the overwhelming evidence of adequacy.

The Eleventh Circuit fully considered the factual record before it, correctly applied this Court's decisions in Celotex and Anderson and the controlling substantive law of Georgia, and properly held that Respondent's ". . .warning was sufficient as a matter of law." Pruitt v. PPG Industries, Inc., 895 F.2d 734, 736 (1990). Accordingly, it properly affirmed summary judgment in Respondent's favor.

(3) THERE EXISTS NO CONFLICT BETWEEN THE DECISION BELOW AND OTHER ELEVENTH CIRCUIT DECISIONS ON SUMMARY JUDGMENT.

Rule 10.1(a), Rules of the Supreme Court of the United States limits certiorari in "conflicting decision" situations to those where a ". . .United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter. . . ." (Emphasis added.)

In an attempt to secure certiorari under Rule 10.1(a), Petitioner asserts that "conflict" exists between the decision below and other Eleventh Circuit decisions applying Celotex and Anderson. Petitioner specifically argues that ". . .apparent difficulties present themselves in attempting to reconcile" Tippens v. Celotex Corporation, 805 F.2d 949 (11th Cir. 1986), and George v.

Brandychase Ltd. Partnership, 841 F.2d 1094 (11th Cir. 1988), with the Eleventh Circuit's decision in this case. (Petition for Writ of Certiorari, page 12).

Historically, in granting certiorari in "conflicting decision" cases, this Court has required that the asserted "conflict" be direct and be readily apparent from the lower court's rationale or result. United States v. Doe, 465 U.S. 605, 610 (1984); Lugar v. Edmonson Oil Co., 457 U.S. 922, 926 (1982); Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 733 (1982).

Although Petitioner asserts that "apparent difficulties" exist in reconciling the Eleventh Circuit's decisions in Tippens and George with the decision rendered below, she fails to articulate wherein the "conflict" lies. Nor has she pointed out any inconsistency

in dicta or in the general principles utilized by the Eleventh Circuit in deciding the three cases. Rather, Petitioner asks this Court to find a conflict to exist simply because the Eleventh Circuit reversed summary judgment in the cited cases and refused to do so on the facts of this case.

Assuming, arguendo, a conflict does exist, Petitioner's reliance on "conflict of decisions" as a basis for certiorari is misplaced in view of this Court's historical reluctance to resolve intra-circuit disputes. Wisniewski v. United States, 353 U.S. 901, 902 (1957)("It is primarily the task of a Court of Appeals to reconcile internal difficulties"). As Justice Harlan wrote ". . .decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an

intramural matter to be resolved by the Court of Appeals itself." Justice Harlan, Manning the Dikes, 13 Record of the N.Y.C. Bar Assn. 541, 552 (1958).

No conflict in the general principles used or in the reasoning involved in other Eleventh Circuit Opinions exists with regard to the case at bar.

Moreover, the Petitioner has not identified any conflict in the decision rendered by the Eleventh Circuit in this case and ". . .the decision of another United States court of appeals on the same matter." Rule 10.1(a), Rules of the Supreme Court of the United States. Accordingly, the Petition for Writ of Certiorari should be denied.

(4) REVIEW OF THE DECISION BELOW WOULD TURN SOLELY UPON AN ANALYSIS OF THE FACTS OF THIS CASE.

Rule 10, Rules of the Supreme Court of the United States establishes the scope

of this Court's discretionary review. It limits certiorari to those situations "when there are special and important reasons therefor."

This Court has historically defined the concept of "importance" in terms of its relationship to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923).

Importance to the "public" is often lacking where review before this Court requires an analysis of the particular facts presented. Indeed, this Court has expressly stated, "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); see also, Texas v. Mead, 465 U.S. 1041 (1984).

The Petition for Certiorari under consideration must be denied since review of the Eleventh Circuit's decision would turn solely upon an analysis of the particular facts of this case. That such an analysis would be required is recognized and underscored by the Petitioner's assertion that evidence supporting her version of the facts is contained "within the record which could be reviewed by this Honorable Court upon grant of this Writ." (Petition for Writ of Certiorari, p. 21)(emphasis added).

CONCLUSION

For the foregoing reasons, Respondent, PPG INDUSTRIES, INC., respectfully requests that the Petition for Writ of Certiorari be denied.

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